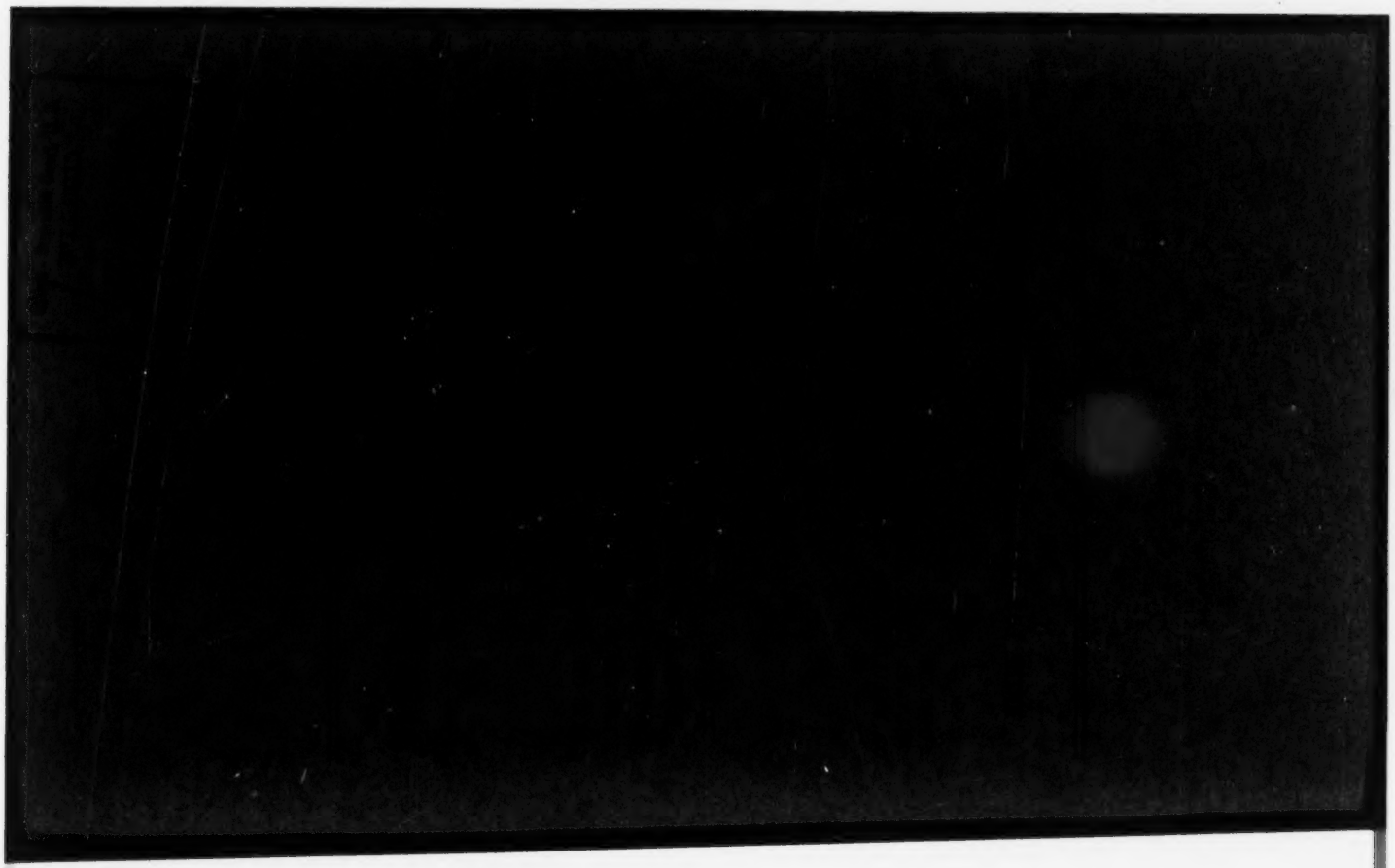

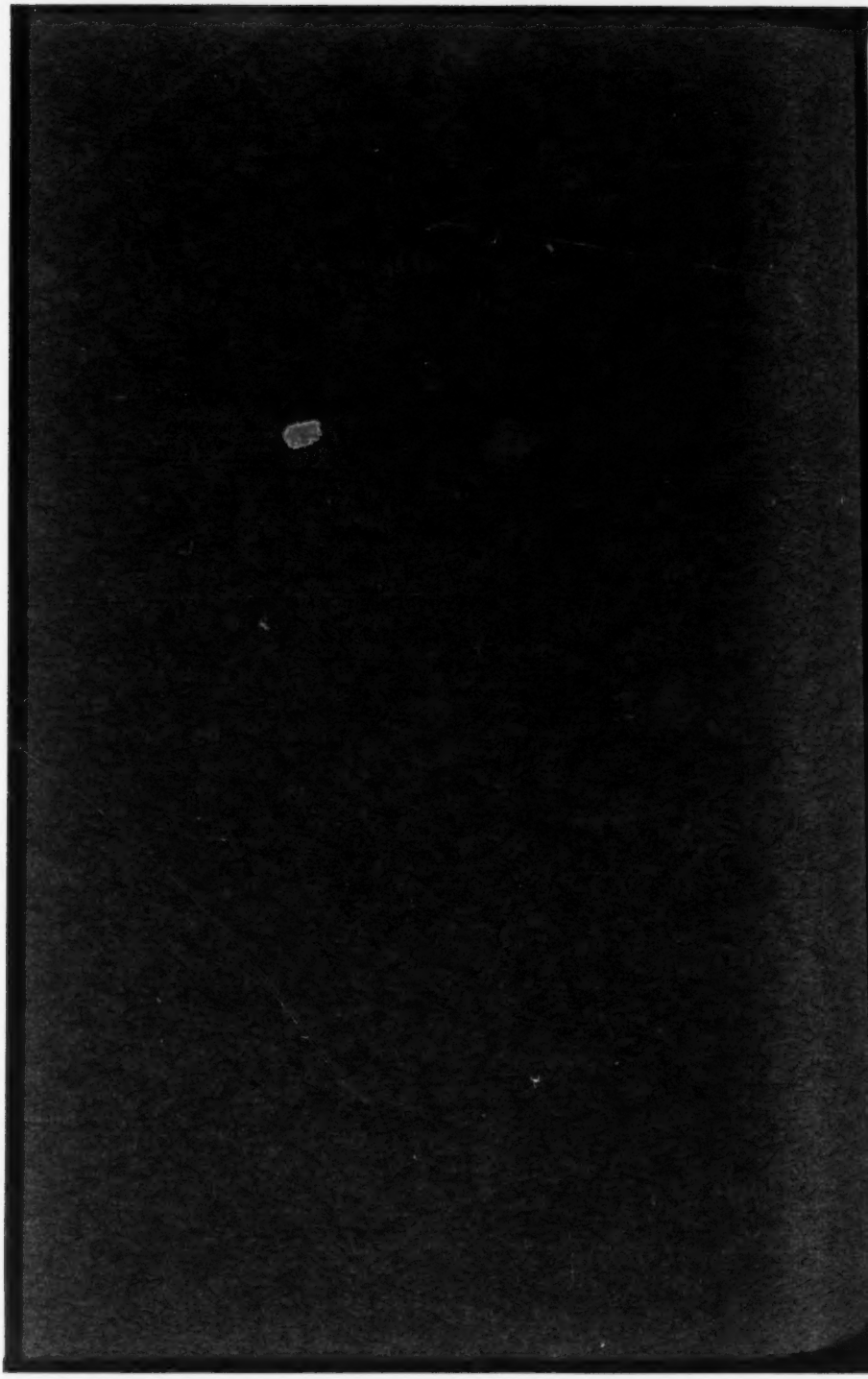

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1195

CITY OF SALAMANCA, HOME OWNERS' LOAN CORPORATION, SALAMANCA TRUST COMPANY, SALAMANCA FEDERAL SAVINGS AND LOAN ASSOCIATION, FIRST NATIONAL BANK OF SALAMANCA, FRANK A. FORNESS AND JESSIE FORNESS, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 312–327) is reported in 37 F. Supp. 337, *sub nom. United States* v. *Forness.* A subsequent opinion of the district court (R. 374–380) written after the appeal was taken is not reported. The opinion of the circuit court of appeals (R. 386–412) is reported at 125 F. (2d) 928, *sub nom. United States* v. *Forness.*

JURISDICTION

The judgment of the circuit court of appeals was entered February 5, 1942 (R. 412). The petition for a writ of certiorari was filed April 29, 1942. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the New York Civil Practice Act is controlling in a suit brought by the United States to enforce a lease made by the Seneca Indian Nation.

STATUTES INVOLVED

The relevant statutes are set forth in Appendix A, *infra*, pp. 11–18.

STATEMENT

The judgment sought to be reviewed (R. 412) reversed a judgment (R. 345–347) dismissing the Government's complaint in a suit brought on behalf of the Seneca Nation of Indians, lessor, to cancel a lease upon lands in the City of Salamanca, New York. The material facts may be summarized as follows:

The City of Salamanca is located upon the Allegany Reservation of the Seneca Nation (R. 258–260, 329–331). Commencing about 1850, railroad companies and settlers obtained from the Senecas leases of real estate in that city (R. 261–263, 329–331). After the state court held that the leases

were invalid [1] notwithstanding the attempt of the New York legislature to ratify them, Congress, by the Act of February 19, 1875, c. 90, 18 Stat. 330, ratified the leases and, in addition, authorized their renewal for a term of twelve years. By Act of September 30, 1890, c. 1132, 26 Stat. 558, the permissible term was extended to 99 years and in 1892 several hundred leases were renewed for that period. Among them was the lease involved in this case. It stipulated an annual rent of $4.00 payable in advance on February 19 and reserved to the Nation the right to cancel the lease in case of a default in the payment of rent (R. 331–333). In 1919, the lease was assigned to petitioners Frank and Jessie Forness, hereafter called Forness. They erected a building on the property and, in 1934, mortgaged it to the Salamanca Trust Company (R. 334–335).

The United States Indian Agent for the New York Agency, to whom the duty of collecting the rents had been delegated by the Act of February 28, 1901, c. 622, 31 Stat. 819, has always had difficulty in making collections; for example, 1,095 leases were in default in 1911 and 529 leases in 1931 (R. 265–269, 273–280). In 1914 the agent then in office designed a form of notice to be used

[1] The opinion of the New York Supreme Court so holding is unreported. Its effect is set forth in House Misc. Doc. No. 75, 43d Cong., 2d sess. (1875), Appendix B, *infra*, p. 19. See also Act of June 30, 1834, c. 161, sec. 12, 4 Stat. 730, 25 U. S. C., sec. 177, prohibiting the leasing of Indian land.

in billing lessees; the notice stated that interest would be charged on unpaid rents but that no charge would be made if the rents were paid by April 20—two months after they became due (R. 335–337). Until 1939 bills in this form were regularly sent to all lessees (R. 335). Among them was Forness, who had paid no rent after April 11, 1930 (R. 143–145). In 1939 he received an annual notice showing that rent payments amounting to $36.00 and interest of $8.64 would be due on February 19, 1939 (R. 337–338).

On March 4, 1939, the Council of the Seneca Nation passed a resolution cancelling all leases then in default (R. 339). On March 6, 1939, Forness, having learned of this resolution, paid $44.64 to the Indian Agent and the money is being held by the Government pending the outcome of this suit (R. 392). At the same time that it cancelled the leases, the Council also authorized the releasing of the lands covered by cancelled leases for an annual rent of not less than 2½ percent of the assessed value of the land, excluding improvements. In the case of Forness, the new rental would amount to $115 a year (R. 235, 239). A leasing committee unsuccessfully sought to negotiate new leases on these terms with defaulting lessees (R. 232, 238–239). And, on June 14, 1940, after this suit was brought but prior to the trial, the Council incorporated the details of the committee's offer in a resolution to which was attached a proposed form of lease providing that

the lessee would subject the land to all liens existing upon the prior leasehold (R. 237–247).

Suit was brought on September 8, 1939, to cancel the lease and to recover possession of the lands occupied by Forness as tenant (R. 5–14).[2] After trial (R. 136–221), the district court dismissed the complaint (R. 345–347). The circuit court of appeals reversed and directed that judgment be entered for the United States upon the condition that the Council's offer to make a new lease be kept open for sixty days after entry of judgment (R. 412).[3]

ARGUMENT

1. The principal questions raised by the petition for certiorari present, in substance, the single issue of whether the case is governed by the New York Civil Practice Act. Sections 997–999

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[2] The Salamanca Trust Company, the mortgagee of the Forness property, was permitted to intervene and answer (R. 33–51), as were also the First National Bank of Salamanca, the City of Salamanca, the Salamanca Federal Savings and Loan Association, and the Home Owners' Loan Corporation, each of which claimed to have liens upon lands held under similar leases (R. 52–135).

[3] At the beginning of the trial (R. 137), the Government moved for summary judgment (see R. 222–283). The district court refused to consider the motion (R. 137). After the printed record and the Government's brief had been filed in the circuit court of appeals, the district court ordered that the affidavits in support of the motion be deleted from the record (R. 370–373; see also R. 374–380). The circuit court of appeals held that the district judge had no authority to strike these affidavits from the record (R. 389). Petitioners do not question this holding (see Pet. 20).

thereof provide in effect that payment of rent before judgment bars ejectment. In the courts below, petitioners contended that this statutory rule applied and that the complaint should be dismissed because they had made such a tender. They based the contention that the Civil Practice Act applied upon the provision of Section 8 of the Act of February 19, 1875, c. 90, 18 Stat. 330, 331, permitting the State of New York to extend its "municipal laws and regulations" over the City of Salamanca, and upon New York Laws, 1881, Chapter 188, extending "all the general laws of the State" over that city. They conceded that Chapter 188 was passed pursuant to the permission given the State by the 1875 Act and argued that the term "municipal laws and regulations" was synonymous with "general laws" and that therefore the federal statute permitted the State to extend the Civil Practice Act to actions on Seneca leases. The courts below rejected petitioners' contention, holding that the 1875 Act refers only to state laws regulating local government (R. 318–321, 389–391).

There is no substance to the contention (Pet. 12–13, 14–18) that the holding is erroneous. The arguments that the 1875 Act should be read as a whole (Pet. 14–15) and with regard to the terms of the leases which it ratified (Pet. 16–17) cast no light on the meaning of the phrase "municipal laws and regulations" nor do they indicate that the courts below misconstrued those words. That phrase, when it is used to describe a body

of laws of one of the states of the United States, must refer to the laws governing the cities, villages, and other municipal corporations of the state, and does not refer, as in international law, to all laws dealing with domestic matters (see opinion below at R. 390–391).

Petitioners now suggest that in chapter 188 New York asserted power to legislate for the Senecas without the consent of Congress, and conclude that the circuit court of appeals silently held chapter 188 to be repugnant to Article I, section 4, of the Constitution (Pet. 12–13, 15–16). But in the courts below, as we have pointed out, the petitioners conceded that chapter 188 was enacted pursuant to the Act of 1875 and had the same meaning, and they argued that, so far as concerned the present case, the question was of the meaning of the phrase "municipal laws and regulations" in the Act of 1875. This concession made it unnecessary for the circuit court of appeals to cite or discuss the state statute The concession, moreover, was proper. The general rule is that state law does not apply to the Indians except so far as the United States has consented. *Worcester* v. *Georgia*, 6 Pet. 515, 516. The New York Supreme Court had held just prior to the enactment of the statutes involved that New York did not have power, in the absence of federal consent, to regulate these leases. (See pp. 2–3, *supra*.) Chapter 188 makes reference to the Act

of 1875, thus showing that it was enacted pursuant to that statute. (See Appendix, p. 17.) In view of these facts, it was not to be supposed that New York sought by statute to regulate these Indian leases, even though it may have extended its laws over Salamanca and other villages to govern persons other than Indians.[4] Cf. *Matter of Patterson* v. *Seneca Nation*, 245 N. Y. 433; *Mulkins* v. *Snow*, 232 N. Y. 47, 51.

For like reasons, the state law is not applicable to the present controversy under the doctrine of *Erie R. R.* v. *Tompkins*, 304 U. S. 64. And, plainly, the lease cannot be supposed to have incorporated the laws of New York merely by preserving to the Indians as lessors the right to "resort to any legal remedy" to eject a defaulting lessee from the premises. Consequently, the court below was free to apply to the decision of the controversy the rule "which comports best with general notions of equity." See *Board of Commissioners* v. *United States*, 308 U. S. 343, 350.

2. Petitioners' remaining contentions present no question of importance. For example, there

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[4] Neither *State of New York* v. *Dibble*, 21 How. 366, nor *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, is to the contrary. The *Dibble* case sustained a New York statute punishing white men who trespassed on Indian lands. The *Kennedy* case held that the federal courts should not, by issuing writs of habeas corpus, interfere with pending proceedings in the state court involving the inheritance of Seneca property.

is nothing requiring review by this Court in their suggestion (Pet. 14, 20–21) that, if they had fully apprised the circuit court of appeals of the details of the new lease, it would not have reversed the judgment or at least would have required a modification in the terms of the proffered lease.[5] Equally without substance are the assertions (Pet. 18–20) that they were lulled into a continuing default and that it would be inequitable now to cancel the lease. As the court below said (R. 407):

> It would be both impractical and unfair to require the Indians to bring suit each year for the paltry sum owed on this plot, a suit costing more than the amount which it would yield, and it would be equally impractical and unfair to hold that they must expend part of the rent for badgering defendants and their neighbors into prompt payment. To hold that the Senecas cannot cancel this lease because they have treated defendants and others generously in the past would, in these circumstances, be a miscarriage of justice.

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[5] The provision of Section 3 of the Act of February 19, 1875, c. 90, 18 Stat. 330, granting the owner of improvements the right to a renewal, does not, of course, apply to Forness, whose lease was cancelled for eight years' default in rent payment. The statute grants that right only when the lease expires by lapse of time.

CONCLUSION

The decision below is correct and presents no conflict of decisions or question of general importance. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1942.